

Anderson, Donald

SANCTIONS

Civil Rule 11

WAC 263-12-125 and RCW 51.52.140 provide that the rules of practice in civil cases shall apply to appeals before the Board. The Board is therefore empowered to impose terms under CR 11 if the facts warrant such a sanction. It was proper to award attorney's fees and costs to a witness required to defend against being recalled to testify concerning documents which a reasonable inquiry would have disclosed to be inadmissible.*In re Donald Anderson, BIA Dec., 87 3724 (1989)* [Editor's Note: The Board's decision was appealed to superior court under King County Cause No. 89-2-11598-1.]

Scroll down for order.

1 December 7, 1982, and hearing loss. He must first prove that his condition, causally related to the
2 July 20, 1979 injury, objectively worsened on a permanent basis between February 17, 1984 and
3 October 2, 1987. Dinnis v. Department of Labor and Industries, 67 Wn.2d 654, 409 P.2d 477 (1965).
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5 The claim was initially closed on February 17, 1984 with a permanent partial disability award
6 equal to 35% of the amputation value of the left arm at or above the deltoid insertion or by
7 disarticulation at the shoulder, taking into consideration the pre-existing amputation of the left thumb,
8 less prior awards. On July 6, 1984 the Department reopened the claim effective June 7, 1984 and on
9 October 2, 1987 the Department reclosed the claim with no additional permanent partial disability
10 award. The latter order is the subject of this appeal.
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12 Mr. Anderson is a 59 year old man with a high school education. He worked in the woods for
13 37 years as a faller, buckler, choker-setter and marker. For almost 25 of those years he worked for
14 Weyerhaeuser. During his time in the woods Mr. Anderson sustained a variety of injuries to his left
15 hand. He cut his left index finger in 1954, he chopped off his left thumb at home in 1954 and he
16 injured his left middle and ring fingers in 1958. The on-the-job injuries to his left index, middle and ring
17 fingers resulted in permanent disability awards.
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19 The injury which is the subject matter of this claim occurred on July 20, 1979, while Mr.
20 Anderson was employed by Weyerhaeuser. He was using a chainsaw when it struck a stump, Kicked
21 back and cut his left arm and leg. His leg healed but the arm continued to cause him problems
22 resulting in, approximately, one dozen surgeries to his left forearm between October, 1979 and
23 December, 1984. The majority of these surgeries were bone grafts performed by Dr. James P.
24 Mowry, an orthopedic surgeon who first saw Mr. Anderson in September, 1979. Mr. Anderson
25 continued to work for Weyerhaeuser between surgeries. He testified that, since the last surgery, in
26 1984, he has been unable to use his left arm.
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28 Mr. Anderson also sustained an industrial injury on December 7, 1982, while employed by
29 Weyerhaeuser, which resulted in the loss of use of his right thumb. Surgery was performed on the
30 right thumb in January, 1983 and it appears that that claim was closed shortly thereafter with a 50%
31 permanent partial disability award, although the record is not entirely clear. Claimant continued to
32 work after the 1982 injury and finally took a disability retirement from Weyerhaeuser in the summer of
33 1984.
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35 Dr. Mowry, the claimant's treating physician, testified that he treated Mr. Anderson from
36 September, 1979 until June, 1986. He believed Mr. Anderson's left arm condition, causally related to
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1 the July 20, 1979 industrial injury, worsened between February 17, 1984 and October 2, 1987. Dr.
2 Mowry found a greater amount of scar tissue formation as a result of multiple additional surgeries. He
3 testified that the scarring of the forearm led, in itself, to decreased strength of the musculature of the
4 forearm and increased sensitivity of the entire ulnar border of the forearm. He also testified to a
5 shortening of the ulna due to the surgeries, which resulted in increased pain. Dr. Mowry was of the
6 opinion that Mr. Anderson's disability increased 5% during this period of time.
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10 Because he is the treating physician, Dr. Mowry's opinions must be given special consideration,
11 particularly in comparison with the testimony of doctors who saw Mr. Anderson on only one occasion.
12 Hamilton v. Department of Labor and Industries, 111 Wn.2d 569, 761 P.2d 618 (1988). Dr. Mowry
13 treated Mr. Anderson over a long period of time and performed numerous operations on his left arm.
14 The doctors presented by the self-insured employer only saw Mr. Anderson on one occasion.
15 Furthermore, Dr. Stephen Fuhs refused to testify as to the question of aggravation. Drs. Richard M.
16 Ulery and Robert M. Chambers believed Mr. Anderson's condition was better on the date of their
17 examination, February 18, 1986, than at any time previously after the onset of osteomyelitis. Dr.
18 Mowry agreed that the left arm was more stable in the area of the previous fracture nonunion, but he
19 believed the function of the arm was somewhat worse. Because of Dr. Mowry's long history with the
20 patient, we find his opinions more persuasive and conclude that Mr. Anderson's left arm condition,
21 causally related to the industrial injury, did objectively worsen on a permanent basis between the
22 terminal dates.
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30 Under Allen v. Department of Labor and Industries, 30 Wn. App. 693, 701, 638 P.2d 104
31 (1981), a worker can establish permanent total disability by showing "that such disability resulted from
32 an aggravation of his initial injury superimposed upon the second injury." Mr. Anderson has proved
33 just that.
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35 Mr. Anderson injured his right hand in 1982 during the course of his employment with
36 Weyerhaeuser. Dr. Mowry testified that he saw Mr. Anderson for that injury and Mr. Anderson was
37 unable to move his thumb. Surgery was performed and Dr. Mowry referred Mr. Anderson to a
38 specialist for a second opinion. Mr. Anderson testified that the claim for that 1982 industrial injury was
39 closed with a permanent partial disability award equal to 50% of the loss of function in his right thumb.
40 Mr. Anderson underwent numerous surgeries on his left arm after the 1982 industrial injury occurred
41 and after the right thumb condition resulting from the 1982 injury reached stability. As a result of those
42 subsequent surgeries, Mr. Anderson's left arm condition causally related to the industrial injury of 1979
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1 worsened. That permanent worsening of the 1979 industrial injury, superimposed upon the
2 impairment from the 1982 right hand industrial injury, (as well as on the substantial left hand
3 disabilities pre-existing the 1979 injury) rendered Mr. Anderson permanently totally disabled as of
4 October 2, 1987.
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7 Dr. Mowry testified that because Mr. Anderson was left-hand dominant, the combination of
8 injuries to both upper extremities would make it difficult for him to compete in the workforce. He
9 testified that Mr. Anderson was not capable of returning to any of his old jobs, but could do sedentary
10 work, as long as he only used his left arm to assist his right. Dr. Mowry stated that Mr. Anderson
11 would have been unable to compete with a normal person, and that he had to have a job under very
12 specific circumstances, with the employer required to make concessions.
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16 Susan Bertino, a vocational counselor, saw Mr. Anderson on at least five occasions --
17 September 3, 1981, September 17, 1981, October 7, 1982, November 8, 1982 and June 18, 1986.
18 Based on testing performed by Employment Security in 1981 at her request, Ms. Bertino concluded
19 that Mr. Anderson's manual dexterity was very poor. She determined that Mr. Anderson was
20 incapable of gainful employment on a reasonably continuous basis, taking into account both the left
21 and right upper extremity disabilities, as well as the hearing loss which Mr. Anderson testified to
22 without objection, but which was not supported by medical testimony in the record.
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27 The experts called by the self-insured employer all testified that their belief that Mr. Anderson
28 could work was based on the proposition that there was no disability in his right hand. However, when
29 Mr. Anderson's right hand disability is taken into account, those jobs suggested by the self-insured
30 employer's vocational experts are no longer feasible as alternative employment for Mr. Anderson.
31 When Mr. Anderson's age, education, work experience, training, and physical limitations related to
32 both the 1979 and 1982 industrial injuries are taken into consideration, the conclusion is inescapable;
33 this man who has worked in the woods for 37 years is not capable of gainful employment on a
34 reasonably continuous basis.
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39 One other issue arose during the course of these proceedings which must be addressed here.
40 The Industrial Appeals Judge entered an interlocutory order awarding attorney's fees and costs to
41 witness Susan Bertino to be paid by the self-insured employer. This order was incorporated into the
42 Proposed Decision and Order and attached thereto as an appendix. The order was entered pursuant
43 to CR 11 which allows the imposition of sanctions if a party or an attorney signs a pleading, a motion
44 or a memorandum which is not "well grounded in fact", or "warranted by existing law or a good faith
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1 argument for the extension, modification, or reversal of existing law," or which is "interposed for any
2 improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost
3 of litigation."
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5 WAC 263-12-125 and RCW 51.52.140 provide that the practice in civil cases shall apply to
6 appeals before this Board. The Board is, therefore, empowered to impose terms under CR 11, if the
7 facts warrant such a sanction.
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10 In this case, the employee's attorney filed a motion requesting leave to recall Susan Bertino,
11 the claimant's vocational expert witness, to impeach some of her prior testimony. Weyerhaeuser
12 wanted to use a Department order of June 15, 1984, which purported to deregister Ms. Bertino. This
13 order was stamped "VOID" in large red letters on its face. The Department file contained another
14 order, dated January 29, 1987, stating that this "VOID" order was not to be used to impeach Ms.
15 Bertino's credibility or professional qualifications. The order also purported to permit Ms. Bertino to
16 testify under oath that no deregistration had occurred.
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19 Under Miller v. Badgley, 51 Wn. App. 285, 753 P.2d 530 (1988) there is no longer a good faith
20 defense under CR 11. The standard to be used is one of a reasonable inquiry. A reasonable inquiry
21 would have placed Weyerhaeuser's attorney on notice that the "VOID" documents were inadmissible
22 in any proceeding and that the January 29, 1987 Department order prevented their use by any party
23 by making all documents void from inception, thus rendering Ms. Bertino's answers to questions posed
24 to her under cross examination correct and not subject to attack for credibility. Weyerhaeuser must
25 therefore pay Ms. Bertino's attorney's fees and costs in the amount of \$1,242.05.
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28 After a review of the entire record, we conclude that the Department order of October 2, 1987
29 adhering to the provisions of the Department order dated July 24, 1987, closing the claim with time
30 loss compensation as paid through June 6, 1986 and without additional permanent partial disability
31 award is incorrect and reversed and the claim is remanded to the Department of Labor and Industries
32 with direction to place the claimant on the pension rolls and find a time loss compensation
33 overpayment for the period of September 19, 1986 through October 16, 1986 in the amount of \$
34 1,090.60 which will be considered an advance on future benefits.
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37 **FINDINGS OF FACT**

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- 39 1. On August 2, 1979, the claimant, Donald Anderson, filed an accident
40 report with the Department of Labor and Industries alleging the occurrence
41 of an industrial injury on July 20, 1979 while in the course of his
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1 employment with the Weyerhaeuser Company. On March 24, 1980, the
2 Department issued an order allowing the claim.

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4 On February 17, 1984, the Department issued an order closing the claim
5 with a permanent partial disability award equal to 35% of the amputation
6 value of the left arm at or above the deltoid insertion or by disarticulation at
7 the shoulder, taking into consideration the preexisting amputation of the
8 left thumb, less prior awards.

9 On June 29, 1984, the claimant filed an application to reopen his claim.
10 On July 6, 1984, the Department issued an order reopening the claim
11 effective June 7, 1984. On July 24, 1987, the Department issued an order
12 closing the claim with time loss compensation as paid through June 6,
13 1986 with a time loss compensation overpayment for the period of
14 September 19, 1986 through October 16, 1986, in the amount of \$
15 1,090.60 which will be considered an advance on future benefits and
16 without an additional partial disability award.

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18 On September 18, 1987, the claimant filed a protect and request for
19 reconsideration with the Department. On October 2, 1987, the
20 Department issued an order adhering to the provisions of the July 24,
21 1987 Department order. On November 12, 1987, the claimant filed a
22 notice of appeal to the Board of Industrial Insurance Appeals. On
23 November 24, 1987, this Board issued an order granting the claimant's
24 appeal, assigning it Docket No. 87 3724 and directing that further
25 proceedings be held.

- 26 2. Prior to July 20, 1979, the claimant had sustained injuries to his left hand
27 which resulted in some permanent disability to his left index, middle and
28 ring fingers as well as in the complete amputation of his left thumb and
29 associated permanent partial disability equal to 100% of the amputation
30 value of the left thumb at the metacarpophalangeal joint.
- 31 3. On July 20, 1979, while in the course of his employment as a buckler and
32 faller with the Weyerhaeuser Company, the claimant cut his left forearm
33 and left leg with a chainsaw, sustaining a left forearm laceration,
34 osteomyelitis, fracture and non-union of the ulna. As a result of this
35 industrial injury, Mr. Anderson underwent numerous surgeries from
36 October, 1979 through December, 1984.
- 37 4. On December 7, 1982, claimant was in the course of his employment with
38 Weyerhaeuser Company when the starter on a chainsaw he was using
39 kicked backwards causing a right thumb injury which required surgical
40 treatment in January, 1983 and resulted in a 50% permanent disability.
- 41 5. As of February 17, 1984, claimant's permanent partial disability causally
42 related to the July 20, 1979 industrial injury was equal to 35% of the
43 amputation value of the left arm at or above the deltoid insertion or by
44 disarticulation at the shoulder. This award was over and above all
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1 preexisting permanent partial disability related to the amputation value of
2 his left thumb.

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4 6. Between February 17, 1984 and October 2, 1987, the claimant's left arm
5 condition, causally related to the July 20, 1979 industrial injury, became
6 unstable and required further surgical treatment.
- 7 7. As of October 2, 1987, the claimant's left arm condition, causally related to
8 the July 20, 1979 industrial injury was fixed and stable with no further
9 medical treatment indicated.
- 10 8. Between February 17, 1984 and October 2, 1987, the claimant's left arm
11 condition, causally related to the July 20, 1979 industrial injury,
12 permanently worsened in that the claimant had reduced function of the left
13 arm due to increased scar tissue and increased shortening of the ulna as
14 a result of numerous surgeries necessitated by the industrial injury.
- 15 9. The claimant is a fifty-nine year old man with a high school education who
16 worked in the woods for approximately thirty-seven years as a logger,
17 faller, buckler, choker-setter and marker.
- 18 10. The worsening of claimant's left arm condition causally related to the
19 industrial injury of July 20, 1979, superimposed upon the disability caused
20 by the Department 7, 1982 industrial injury and claimant's other
21 pre-existing disabilities, rendered Mr. Anderson unable to perform any
22 form of gainful employment on a reasonably continuous basis in light of his
23 age, education, work experience and training as of October 2, 1987.

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26 **CONCLUSIONS OF LAW**

- 27 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
28 and the subject matter to this appeal.
- 29 2. Between February 17, 1984 and October 2, 1987, the claimant's left arm
30 disability, causally related to the July 20, 1979 industrial injury, became
31 permanently aggravated within the meaning of RCW 51.32.160.
- 32 3. As of October 2, 1987, the claimant was totally and permanently disabled
33 within the meaning of RCW 51.08.160, as a proximate result of his July
34 20, 1979 industrial injury.
- 35 4. The Interlocutory Order Awarding Attorney's Fees and Costs which was
36 entered on October 17, 1988 is incorporated herein by this reference. The
37 self- insured employer is ordered to pay witness Susan Bertino's costs and
38 attorney's fees in the amount of \$1,242.05 pursuant to CR 11.
- 39 5. The order of the Department of Labor and Industries dated October 2,
40 1987 which adhered to the provisions of a July 24, 1987 Department order
41 which closed the claim with time loss compensation as paid through June
42 6, 1986, with a time loss compensation overpayment for the period of
43 September 19, 1986 through October 16, 1986, in the amount of \$
44 1,090.60 which will be considered as an advance on future benefits, and
45 without an additional permanent partial disability award, is incorrect and is
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1 reversed and the claim is remanded to the Department with direction to
2 place the claimant on the pension rolls.

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4 It is so ORDERED.

5 Dated this 18th day of May, 1989.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

7 /s/

8 SARA T. HARMON

Chairperson

9 /s/

10 FRANK E. FENNERTY, JR.

Member

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12 **DISSENT**

13 I disagree with the majority's determination that Mr. Anderson became permanently totally
14 disabled as a proximate result of an increase in left arm disability during the 1984-1987 aggravation
15 period due to the 1979 injury. Crucial to the majority's decision, even under the rationale of Allen, is
16 the finding that there was in fact a permanent worsening of his left arm functional impairment during
17 the aggravation period. The majority relies solely upon its interpretations of Dr. Mowry's opinions, in
18 making this determination.

19 I am not nearly as persuaded by Dr. Mowry's testimony, which is vacillating and even
20 self-contradictory on this critical issue of additional permanent left arm disability. Viewing all the
21 medical evidence herein, I believe the great preponderance thereof is that claimant's left arm disability
22 was no greater in October, 1987 than it had been in February, 1984. Indeed, if there was any change
23 over that period of time, it was one of some permanent improvement rather than worsening. Our
24 Industrial Appeals Judge analyzed this aggravation issue accurately and thoroughly from page 10
25 through page 15 of his Proposed Decision and Order and I incorporate that discussion here.

26 Based on the foregoing comments, I would affirm the Department's closing order of July 24,
27 1987, as adhered to on reconsideration on October 2, 1987, in its entirety.

28 As to the unfortunate circumstance of witness Susan Bertino finding it necessary to incur
29 attorney's fees and costs to defend against employer's counsel's motion and related actions
30 attempting to impeach the credibility of Ms. Bertino as an expert witness, I can find no persuasive
31 reason to disagree with the majority's assessment of those costs and fees against the employer
32 pursuant to CR 11.

33 Dated this 18th day of May, 1989.

34 /s/

35 PHILLIP T. BORK

Member